IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 529 OF 2006
WITH
CIVIL APPLICATION NO. 759 OF 2006

Baburav Krishna Patil ..Appellant

Vs.

1. Dhondiram Krishna Patil
Deceased throiugh his L.Rs-
1(a) Parvati Dhondiram Patil
and ors. ..Respondents

Mr. Sameer Tambekar for appellant.
Mr. P.M. Arjunwadkar for respondent nos.1-b to 1-f and 4.

CORAM: B.H. MARLAPALLE, J.

Date : June 13, 2007.

P.C.:

1. Heard Mr. Sameer Tambekar the learned counsel for the appellant-plaintiff. This second appeal arises from the decree of partition and separate possession passed by the learned Civil Judge, J.D. at Ichalkaranji on 26/2/1996 in RCS No.368 of 1983 and confirmed by the Lower Appellate Court by dismissing Regular Civil Appeal No. 10 of 2005 as per the Judgment and Order dated 24/3/2006.

2. The appellant-plaintiff filed RCS No.368 of 1983 against his brother - defendant no.1, his son - defendant no.3, Daulat Dattu Patil - son of plaintiff's deceased brother Dattu, defendant no.4 is the wife of defendant no.3 and defendant no.5 is the sister of the plaintiff and defendant no.1. The trial court on assessment of evidence held that though there was a partition between the brothers in the year 1970, some of the suit properties, namely, the agricultural land in R.S.No.669/1 admeasuring 99 R, House No.3895 and open plots C.S. No.3842 and 3844 were not partitioned. The trial court further held that the other suit properties, namely, the agricultural land in R.S.No.20/6/1 admeasuring 1 H and 8 R, R.S. No.20/3 admeasuring 22 R, R.S. No.20/5 admeasuring 24 R and R.S. No.72/2 and R.S. No.129 were the properties acquired by the defendants in 1970 or after 1971 and they were self acquired properties of the respective defendants. Consequently, the trial court passed the following decree:-

(a) The plaintiff as well as the defendant nos.1,2 and 5 are entitled to get 1/4th share

each in suit properties R.S.No.669/1, C.S.No.395 (House property), C.S.No.3842 and C.S.No.3844 as open plot respectively.

(b) The plaintiff is entitled for partition of suit land 669/1 and separate possession of 1/4th share and defendant No.1,2 and 5 each entitled for 1/4th share.

(c) Partition in respect of agricultural land be made by District Collector, Kolhapur.

(d) Partition in respect of suit house and two open plots made by appointing Court Commissioner.

3. Not being satisfied with the decree passed by the trial court partly allowing the suit, the plaintiff filed Regular Civil Appeal No.10 of 2005 and the Lower Appellate Court by reappreciating the evidence held that the plaintiff could not prove that the suit properties B, C and D and moveable property described in schedule attached with the plaint were

joint family properties of plaintiff and defendant nos.1 and 2. It is to be noted that so far as the finding of the trial court that the suit properties A were ancestral joint family properties of the plaintiff, defendant nos.1,2 and 5 remain unchallenged, in so far as the defendants are concerned. It was the case of the plaintiff that the properties mentioned in A, B, C and D were all ancestral joint family properties. During the course of argument before the Lower Appellate court, the learned counsel for the appellant conceded that the suit property D was already reconveyed to its owner and, therefore, it was not available for partition. It was further contended by the learned counsel for the appellant that the suit properties B and C when acquired in 1981 were the joint family properties of plaintiff, defendant nos.1 and 2 and that time all the members of the family were together i.e. plaintiffs and defendant nos.1 and 2. He conceded that the properties were acquired in the names of defendant nos.3 and 4 but out of joint family income and, therefore, it would not be treated to be the sole property of defendant nos.3 and 4. The burden was undoubtedly on the plaintiff to prove the same.

However, the Lower Appellate Court analysed the evidence adduced before the trial court and recorded a finding that there was nothing to show that there was a common nucleus or family income from which the properties B and C were acquired. It referred to the decision in the case of Mudigowda Gowdappa Sankh V/s. Ramchandra Revgowda Sankh (dead by his L.Rs.) [AIR 1969 SC 1076] in which it has been observed that there is not presumption that a Hindu family merely because it is joint, possess any property and the burden of proving that any particular property is joint family property is, therefore, at the first instance upon the person who claims it as a coparcenary property. On the contrary, the evidence of PW 1 clearly indicated that his father Krishna used to bring agricultural yield from the land at Atigre and it admeasured only 10 to 12 guthas. From his cross-examination it was clear that his father Krishna shifted to Ichalkaranji and at that time there was no ancestral property in his name at Ichalkaranji. The concurrent finding recorded by both the courts below on the issue that the suit properties B and C were not the joint family properties is a fact finding exercise, based on the oral and documentary evidence placed before the trial

court and, therefore, this second appeal does not raise any substantial question of law.

4. Hence, the appeal fails and the same is hereby dismissed in limine.

5. Civil Application No. 759 of 2006 does not survive and the same shall stand disposed as such.

(B.H. Marlapalle,J.)